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No. 139.

IN THE

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1923.

MARGARET C. LYNCH, Executor of the Last Will and Testament of E. J. LYNCH, Collector of Internal Revenue, Deceased,

Petitioner,

v.

TILDEN PRODUCE COMPANY,

Respondent.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Eighth Circuit.

BRIEF FOR THE RESPONDENT.

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STATEMENT OF THE CASE.

The Tilden Produce Company is a corporation duly created, organized and existing under and by virtue of the Laws of Minnesota, with its principal

place of business at St. Paul, Minnesota, where, for all purposes material here, it has been and is engaged in the manufacture of creamery butter. It never has been and is not now engaged in the manufacture of adulterated butter.

In August and September, 1918, it manufactured in its plant in St. Paul creamery butter in the usual and customary way, and of the butter so manufactured 350 tubs, each tub containing 60 pounds, were shipped by the Tilden Produce Company to the Chicago Cold Storage Company, Chicago, Illinois, on September 28, 1918, where the butter in question was placed in storage for the account of the Tilden Produce Company.

Inspections were made by the officials of the Department of Internal Revenue of the 350 tubs of butter so consigned, and upon tests of samples taken severally from the 350 tubs of butter, it was found that the samples taken from 156 tubs contained moisture amounting to 16% or more. The average moisture content in the 156 samples so tested by the officials of the government was 16.76%.

All the butter manufactured by the Tilden Produce Company is tested for moisture in the process of manufacture. A composite sample is taken from the churn, and it is tested for its moisture content. These tests, which cover all of the butter in the 350 tubs of butter, showed a moisture content ranging from 15% to 16%. The average was 15.68%. Transcript Pages 26 et seq., 276. In the event the test showed a moisture content ex-

ceeding 16%, the butter was reworked so as to eliminate the moisture content to less than 16%. There is no such thing as the incorporation of moisture in the butter in the process of manufacture, and on the question of moisture in the butter, the process is rather an elimination of moisture from the cream so that the moisture content remaining is less than the normal moisture content in the cream. Wash water may be added in the process of manufacture of butter, but doing this is a natural, universal and necessary thing, and it is not an incorporation of water in the butter so as to raise the moisture content above the normal content. The butter in question was unsalted butter, and the butter-fat, which is the food product in butter, averaged 82.24%. The butter-fat content, that is the food product, was accordingly high, and confessedly the butter was strictly first-class butter, and of such a quality that it is not excelled anywhere.

The butter in question contained in the 156 tubs was seized upon the pretext that it was adulterated butter, and it was claimed that it was adulterated because it contained excess moisture, and it contained excess moisture because the moisture content in the samples equalled or exceeded 16%, and this was in violation of Regulation No. 9 of the Department, approved July 2, 1907, which reads as follows:

> "The definition of adulterated butter as contained in the Act of May 9, 1902, embraces butter in the manufacture of which any pro-

> cess or material is used whereby the product is made to contain abnormal quantities of water, milk, or cream, but the normal content of moisture permissible is not fixed by the act. This being the case it becomes necessary to adopt a standard for moisture in butter, which shall in effect represent the normal quantity. It is therefore held that butter having sixteen per cent or more of moisture contains an abnormal quantity and is classed as adulterated butter."

The officials of the government knew nothing as to the materials and the methods used in the manufacture of the butter in question, but arbitrarily classified the butter as adulterated butter because, based upon the moisture content of the samples in the 156 tubs, these samples violated the rule of the Department, and therefore the butter contained in the 156 tubs was adulterated butter. In other words, the condemnation of the butter was under and by virtue of the rule of the Department, to-wit: Regulation No. 9. Transcript Page 275.

On notification from the Supervising Agent in Chicago that the butter had been seized, analyzed and found to contain excess moisture as noted, the Tilden Produce Company reported that the butter was manufactured according to law, but notwithstanding, and based wholly upon the Regulation, the butter was assessed and a stamp tax of ten cents (10¢) per pound imposed, which the Tilden Produce Company paid under protest. Transcript Pages 271 et seq.

An application for a refund was made with the usual showing required by the Department, and the refund was denied based upon the alleged violation of Regulation No. 9. Transcript Page 275. In other words, the assessment and tax were levied on the butter on the claim that it was adulterated, and it was claimed that it was adulterated because the moisture content in the samples equalled or exceeded 16%.

Suit was thereupon instituted to recover the sum of Nine Hundred Thirty-six Dollars ($936.00) and interest, the amount of the stamp tax imposed. At the close of the case, each party to the case moved the Court for a directed verdict, and upon motion the Court, following the practice in the Federal Court in such cases, decided the case and directed a verdict in favor of the Tilden Produce Company.

Judgment was entered on the verdict and a writ of error was sued out and the judgment was affirmed by the Circuit Court of Appeals of the Eighth Circuit (282 Fed. 54). A writ of certiorari brings the case here.

POINTS AND AUTHORITIES.

The following points, and the authorities cited in support thereof, appear to comprehend and dispose of the case:

I.

Each party moved for a directed verdict and matters of fact are thereby concluded.

II.

Regulation No. 9 of the Commissioner of Internal Revenue and approved by the Secretary of the Treasury and the Secretary of Agriculture, has no warrant of law and is void.

III.

The record is not sufficient to raise the question of validity of Regulation No. 9.

ARGUMENT.

We come now to a consideration of the first proposition that has been advanced in support of the judgment of the Court below. As noted, the plaintiff and the defendant in the Court below each moved the Court at the close of the case for a directed verdict, and thereupon the Court directed a verdict in favor of the plaintiff, the Tilden Produce Company.

The rule of practice in such cases appears to be as follows:

> "Both plaintiff and defendant requested the court to direct a verdict in its favor. The court directed a verdict for the plaintiff. If there is any evidence to support the verdict, unless some error of law is shown, the judgment of the District Court must be affirmed. Bradley Timber Co. v. White, 121 Fed. 779, 784, 58 C. C. A. 55; City of Colorado v. Harrison, 228 Fed. 894, 143 C. C. A. 292; Lockhart v. Tri-State Loan & Trust Co. (C. C. A.) 268 Fed. 523; Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; Sena v. American Co. 220 U. S. 497, 31 Sup. Ct. 488, 55 L. Ed. 559."
>
> South Atlantic etc. v. York etc. 276 Fed. 509-511.

And we again quote as follows:

> "As both parties moved for a ruling, and as there was nothing more, according to Beuttell v. Magone, 157 U. S. 154, 39 L. Ed. 654, 15

Sup. Ct. Rep. 566, it stood admitted that there was no question of fact sufficient to prevent a ruling being made, *and the motions together amounted to a request that the court should find any facts necessary to make it; so that unless the ruling was wrong as matter of law, the judgment must stand.*"

Sena v. American Turquoise Co., 220 U. S. 497, 500.

It is unnecessary to cite additional cases in support of the foregoing rules. As noted, the effect of the motions is that the trial court shall make the necessary findings of fact, and these findings of fact will not be disturbed if there is evidence to support them. In other words, the plaintiff in error in the case at bar is in a position equivalent to a jury verdict in favor of the plaintiff in the Court below on the issues of fact. This properly leaves the case to turn upon the validity of Regulation No. 9 of the Department, and in effect that is what the position taken in behalf of the government in the case at bar amounts to. An assessment and tax were levied and collected on the butter in question upon the authority of the validity of Regulation No. 9, and even so the government's case is made to rest upon the moisture content of 16% plus in individual samples taken from 60-pound tubs. We shall discuss the question of the Validity of Regulation No. 9 later in the argument.

In the order directing a verdict the Court called attention to the pertinent statute, which, as far as material in the case at bar, provided that adulter-

ated butter was "any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream * * * ." Transcript Page 268.

The Court thereupon defined "abnormal" as follows:

> "Abnormal is generally defined as meaning a deviation of a fixed rule or a fixed standard; something that is irregular, and the question then arises whether there is a fixed rule or standard for the quantity of water in butter." Transcript Page 269.

As bearing upon what might be termed the normal moisture content in butter, that is the amount of moisture that is naturally found in butter, we call attention to the cross-examination of Sydney C. Thompson, a chief witness in behalf of the government. Mr. Thompson has for many years been employed by the Bureau of Animal Industry of the United States Department of Agriculture, and in charge of investigations pertaining to the manufacture of butter. Mr. Thompson is likewise a writer and authority on butter. Transcript Pages 249 et seq. We quote from Mr. Thompson's testimony as follows given upon cross-examination:

> "Q. Generally speaking the manufacture of butter is segregating the butter-fat in the cream, and eliminating the moisture down to under 16 per cent, speaking in a general way?
>
> A. Yes, sir.

Q. The question of expulsion of moisture and segregating and coalescing butter-fat?
A. Yes, sir." Transcript Page 253.

We are rather constrained to make a somewhat startling observation here, and it is that the government in effect boldly charges the Tilden Produce Company with using materials or a process with intent or effect to cause the absorption of abnormal quantities of water, but there is no proof whatsoever to support such charge. It is fair to say, however, that the economic effect of Regulation No. 9 of the Department is that the moisture content found in butter may be relatively larger than before the said Regulation was promulgated on July 2, 1907. Competitive conditions have naturally brought this about, but it merely means that the water content, as the trial court observed, may be to some extent under the control of the butter maker. *The moisture, however, is naturally constituent in the milk and cream, and in the manufacture of butter we have a process of elimination of moisture, and not absorption.* Now, the startling thing is that the official of the government, with the government complaining that the plaintiff below is incorporating water in the butter, himself does this very thing, and, as we understand it, this may be a violation of law. The reference is what Mr. Thompson does in the government creamery at Grove City, Pennsylvania, of which he has charge, and we quote from his testimony as follows:

"Q. At a certain point you add a little moisture and incorporate a little moisture?

A. Yes, sir.

Q. In other words, to that extent you down there cause the absorption or incorporation of moisture to a small extent?

A. We do.

Q. Insofar as that is a process of incorporating or absorbing, as distinguished from the general process of elimination of moisture?

A. Yes, sir.

Q. Then, according to your department, would it be proper enough with a moisture content of 14 per cent, found in your moisture test to incorporate water up to 15.5?

A. We considered it so." Transcript Pages 254, 256.

We pass this by, however, and likewise the apparent inability of Mr. Thompson to explain why it was that a lower temperature caused the expulsion of moisture, in the process of manufacture. The reason, of course, is that if the cream is cooled, the granules of butter-fat become hardened with a natural tendency to expel the moisture. Transcript Page 255. *A reading of the testimony, however, makes it clear that the making of butter is a process of eliminating and not absorbing moisture.* We come then to the normal moisture content in butter, and we again quote from Mr. Thompson's testimony given upon cross-examination as follows:

"Q. Now, Mr. Thompson, I have in my hand here a text book, 'The Book of Butter', which is a (text) book on the Nature, Manufacture, and Marketing of the Product, by Ed-

ward Sewell Guthrie, Professor of Dairy Industry, New York State College of Agriculture, at Cornell University. Do you know him?

A. I do.

Q. He is an authority?

A. Yes, sir.

Q. I will just ask you to read under the general subject matter of Composition and Food Value of Butter, on top of page 11 of the book. (Which the witness apparently does.) You have it?

A. Yes, sir.

Q. There is a reference there to one Thompson. Are you the Thompson?

A. I am.

Q. Just read the first sentence there?

A. Under 'Water'? 'According to Thompson, Shaw and Norton, the average percentage of moisture in butter is 13.9, and the variation is 10.13 to 20.65.'

Q. The author is within his rights in making that observation?

A. It is taken from this bulletin we have here.

Q. In other words, it is not a mis-quotation?

A. No.

Q. And Shaw and Norton are likewise authorities?

A. They are chemists.

Q. Turning to the same book, on page 8, under 'Fat'. I will ask you to read the first sentence of that, which I have marked.

A. 'The variation in fat, according to Thompson, Shaw and Norton, is between 73.49 and 87.39, per cent.'

Q. You are the Thompson referred to there?

A. Undoubtedly.

Q. And that doesn't do violence to the fact —it is within—the author is within his observation?

A. I presume so.

Q. At least you don't say that he is not." Transcript Page 258.

The trial court was accordingly right in his observations as to the normal moisture content in butter and the variations thereof. Transcript Page 269. It may be here noted in passing that the butter-fat content of the butter involved in this case was 82.24%, and thus exceeded the butter-fat content of 80% which has generally been recommended by the various committees on standards of butter-fat to be contained in butter. Transcript Pages 241 et seq. See also, Sec. 8722a, infra.

The government says that the butter in question is adulterated, but the startling fact appears that it contains more butter-fat than the average butter-fat contained in the butter in the Minnesota prize butter contest, and Minnesota makes the best butter in the world. Transcript, Pages 238, 240.

As bearing upon the moisture of the butter in question and the materials and processes that were used, we call attention to the testimony of Witness Fadden (Transcript Page 23 et seq.), Witness Scheipl (Transcript Page 60 et seq.), and Witness Dorniden (Transcript Page 64 et seq.).

Thereupon, and in addition to proving the same thing by the witness in question, the plaintiff be-

low called several experts, and each qualified upon the proper foundation laid, and assuming the testimony to be true, gave testimony and opinion that the butter in question was made in the usual way and in the manufacture of the butter no process or materials were used with intent or effect to cause the abnormal absorption of water, and in effect that the process was the elimination of moisture.

We here call attention to the testimony of Witness Bower (Transcript Page 53 et seq.), Witness Duvel (Transcript Page 89 et seq.), Witness Farrell (Transcript Page 101 et seq.), and Witness Radke (Transcript Page 69 et seq.).

The result of the foregoing is that the testimony is conclusive that moisture was not absorbed or incorporated, but on the other hand the process was one of elimination, and the findings of the Court insofar are more than justified by the evidence. Transcript Page 270.

The Court having defined "abnormal" as used in the statute, and having found that there is no testimony that the moisture content in the butter in question was anything but normal, and having observed that there was no testimony upon which a jury could find that there was an abnormal moisture content in the butter, thereupon concluded as follows:

> "Further than that, this statute reads, in defining adulterated butter, that it is butter 'in the manufacture or manipulation of which any process or material is used, with intent or effect of causing the absorption of abnormal

quantities of water, milk, or cream. The word *absorption* is also a word that requires definition or explanation. I think the word should not be given a very narrow meaning in the statute as used; but it should be broad enough to include the incorporation of water, whether it might be technically called absorption or not. But whether it is called absorption or whether it is called incorporation, *I think the statute means that the water is to be introduced into the butter from the outside.* In other words, that the retention in the butter, while it is being manufactured, of part of the water which was originally in the cream even to a large extent, would not be an absorption of water in the butter within the meaning of the statute; that there must be some process by which water from outside of the butter is caused to be absorbed or incorporated into the butter, before the butter can properly come within the statute that I have read. Now, if that is the true meaning of the word *absorption* as used in the statute, *then when we come to apply that to the evidence in this case we do not find, in my judgment, any evidence such that the jury would be able to base a finding thereon that the plaintiff in the manufacture of its butter had used a process which would cause the absorption or the incorporation of abnormal quantities of water in the butter, before it finally reached its completed stage.* For these reasons, it seems to me that the evidence is not sufficient on which the jury could find that the butter manufactured here by the plaintiff was adulterated butter, within the meaning of the statute." Transcript Page 270.

The following language of Judge Sanborn (Wisconsin) in a similar case is pertinent:

> "Under the statute it must appear that there was intent *to cause the absorption of an abnormal quantity of water.* The testimony, however, shows that the butter was honestly made, and that there was no intent to adulterate it or produce an abnormal quantity of water. *The butter was honestly made, in the ordinary way,* and it also appears that there was nothing in the manipulation or manufacture which caused the product to contain more than 16 per cent of water."
>
> Baldwin Co-Operative Creamery Assn. v. Williams, 233 Fed. 608.

It thus appears that in order to jury issues two essentials in the proof must appear: (1) That there was an abnormal quantity of moisture in the butter, and (2) a process or material was used with intent or effect to cause the absorption of such abnormal quantity of moisture.

We conclude this aspect of the case by a re-statement of the rule as follows:

> "At the conclusion of the evidence, both parties requested of the court a directed verdict. The court granted the request on behalf of the Lumber Company and refused that of the Boom Company. The rule of law and procedure in this jurisdiction is well established that, where both parties ask the court to instruct a verdict, both affirm that there is no disputed question of fact to be submitted to the jury, and that every disputed question of

fact is concluded in favor of the prevailing party, and that the only questions open to review on writ of error are: Was there any substantial evidence to support the court's finding upon the facts. And was there any error in the application of the law? Beuttell v. Magone, 157 U. S. 154, 15 Sup. Ct. 566, 39 L. Ed. 654; U. S. v. Bishop, 125 Fed. 181, 182, 60 C. C. A. 123; Empire State Cattle Co. v. Atchison, T. & S. F. Ry. Co., 147 Fed. 459, 77 C. C. A. 601; Roth, Executrix v. Mutual Reserve Life Ins. Co., 162 Fed. 282."

Rainy Lake River Boom Corp. v. Rainy River Lumber Co., 162 Fed. 290, C. C. A. 8th Circuit.

II.

The Circuit Court of Appeals of the 8th Circuit held in

United States v. 11,150 Tubs of Butter, 195 Fed. 657,

that Regulation No. 9 is void. We shall later make particular reference to the decision in that case.

In a preliminary way, we think the following observation of Judge Booth is well made:

"The question of delegation of power by the Legislature, and especially legislative power to other branches of the government, to administrative boards or to individuals, has been a question that has caused a great deal of controversy in the courts, not only in the state courts, but also in the federal courts. It has been said that the Legislature makes the law, that the executive executes the law, and that

the judiciary expounds or determines what the law is. Of course, that is true as a general statement; but as a matter of fact it is of little help in any particular case, because practically all the cases that arise are border line cases, and the question to be determined is whether the particular act is a legislative act, or whether it is a judicial act, or whether it is an executive or an administrative act."

Cook v. Burnquist, 242 Fed. 324.

And as follows:

"If a head of a department has the power to make rules which subject classes of property to forfeiture and classes of persons to penalties, that power must be expressly given him by Congress, and well defined, so as to make his rule or regulation an act of the supreme law-making body. He will get no such power from section 161 of the Revised Statutes. U. S. v. 11,150 Pounds of Butter, 195 Fed. 657, 115 C. C. A. 463."

Keane v. United States, 272 Fed. 584.

The difficulty is, of course, not so much a statement of the rule as the application of the rule, but it is clear that the secretary can only make rules and regulations which are consistent with law.

Section 251 Revised Statutes,

Section 384 U. S. Compiled Statutes.

On the general question of the delegation of power to make rules and regulations and the principles which determine the validity thereof, we quote as follows:

"It must be admitted that it is difficult to define the line which separates legislative power to make laws, from administrative authority to make regulations. This difficulty has often been recognized, and was referred to by Chief Justice Marshall in Wayman v. Southard, 10 Wheat, 42, 6 L. ed. 262, where he was considering the authority of courts to make rules. He there said: 'It will not be contended that Congress can delegate to the courts, or to any other tribunals, powers which are strictly and exclusively legislative. But Congress may certainly delegate to others powers which the legislature may rightfully exercise itself.' What were these nonlegislative powers which Congress *could* exercise, but which might also be delegated to others, was not determined, for he said: 'The line has not been exactly drawn which separates those important subjects which *must* be entirely regulated by the legislature itself, from those of less interest, in which a general provision may be made, and power given to those who are to act under such general provisions to fill up the details.'

From the beginning of the government, various acts have been passed conferring upon executive officers power to make rules and regulations,—not for the government of their departments, but for administering the laws which did govern. None of these statutes could confer legislative power. But when Congress had legislated and indicated its will, it could give to those who were to act under such general provisions 'power to fill up the details' by the establishment of administrative rules and regulations, the violation of

which could be punished by fine or imprisonment fixed by Congress, or by penalties fixed by Congress, or measured by the injury done."

United States vs. Grimaud, 220 U. S. 517, 55 Law. Ed. 567.

and as follows:

"The legislature cannot delegate its power to make a law, but it can make a law to delegate a power to determine some fact or state of things upon which the law makes or intends to make its own action depend. To deny this would be to stop the wheels of government. There are many things upon which wise and useful legislation must depend which cannot be known to the lawmaking power, and must therefore be a subject of inquiry and determination outside of the halls of legislation."

Marshall Field & Co. v. Clark, 143 U. S. 694, 36 Law. Ed. 310.

and as follows:

"That 'Congress cannot delegate legislative power is a principle universally recognized as vital to the integrity and maintenance of the system of government ordained by the Constitution.'"

Marshall Field & Co. v. Clark, 143 U. S. 692, 36 Law. Ed. 309.

Attention is also called to:

First National Bank of Bay City vs. Grant Fellows, Attorney General of Michigan, 244 U. S. 416, 61 Law. Ed. 1233.

We come, then, to an application of these rules. It may be that it would be competent to establish

an administrative rule fixing the standard of moisture in butter. It is submitted, however, that it would not be competent to declare by rule that the precence of moisture in butter equalling or exceeding such standard demonstrated that a process or material had been used with intent or effect to cause the absorption of an abnormal quantity of moisture.

The court embodied this thought in the following language:

> "We find it unnecessary, in our view of the evidence, to determine whether Regulation No. 9 is valid or not, for the reason that, conceding it to be valid so far as creating a standard is concerned, there is no evidence in the record that the average moisture found in the butter got there by the intentional or effective use of a process or material by plaintiff which caused the butter to absorb such moisture."
>
> Lynch vs. Tilden Produce Co., 282 Fed. 57.

We now quote from the decision of the trial court as follows:

> "I observe that in that rule as promulgated there is quoted the following words 'contain abnormal quantities of water, milk or cream'. I suppose that was intended to be a quotation from Section 4, chapter 784, 32 Stats. at Large, the Act of May 9, 1902; but I observe by looking at the wording of that section that the language contained therein is not '*contain* abnormal quantities of water, milk or cream', but the 'absorption of abnormal quantities of water, milk or cream.' I don't know whether

the rule is correctly quoted in the decision—reading from 195 Federal, or not, but if it is, the purported quotation in the rule from the statute, as I read the statute, is not a correct quotation. Passing that by; the Circuit Court of Appeals of this circuit has held that the rule in question is invalid, for various reasons. That holding is found in the case of United States v. 11,150 lbs. of Butter, 195 Fed. 657. The decision of the Circuit Court of Appeals is of course binding upon this court. So that the rule or regulation which I have quoted must be held by this court to be invalid, and not controlling in the case, and the case must therefore be considered as if there were no such rule or regulation in force." Transcript, Pages 267-268.

We quote the following syllabus:

"If, on the other hand, the correct interpretation is, as counsel for the government claims, that it makes all butter which contains 16 per cent or more, or an abnormal quantity, of moisture 'adulterated butter,' whether the abnormal quantity was introduced into the butter by the use of some process or material with intent or effect of causing it to be absorbed by the butter or not, then the rule is unauthorized and void, because it has the effect to subject classes of property to forfeiture, and classes of persons to fines and penalties, that are excluded therefrom by the plain terms of the law."

United States v. 11,150 Pounds of Butter, 195 Fed. 657.

From the foregoing, it is clear, that Regulation No. 9 is void.

Since the trial of the action, and since the decision of the Circuit Court of Appeals, Congress on March 4, 1923 passed "An Act to Define Butter and to Provide a Standard Therefor", and this reads as follows:

> "§ 8722a. Butter; definition and standard therefor—For the purposes of the Food and Drug Act of June 30, 1906 (Thirty-fourth Statutes at Large, page 768), 'butter' shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter, and containing not less than 80 per centum by weight of milk fat, all tolerances having been allowed for. (March 4, 1923, c. 268)"

It is to be noted that the butter involved in the case at bar contained 82.24 per cent of milk fat. The term used in the record is "butter fat", but "milk fat" and "butter fat" are the same thing. Attention is also called to the clause "* * * all tolerances having been allowed for." This evidently means that the requirement of 80 per cent by weight of milk fat in butter is not absolute, but a tolerance should be permitted to account for the difference in tests, readings, appliances and the like. Allowing a tolerance of ½ per cent, and this seems a reasonable tolerance, then butter would be lawful butter which contained 79½ per cent by weight of milk fat. The butter in question con-

tained 2.74 per cent of milk fat in excess of such requirement. The statute illustrates also that the thing that is stressed is milk fat, that is, the food product, and not the moisture. This sounds reasonable. Transcript, page 241.

For the reasons stated, it is submitted that Regulation No. 9 is void.

III.

It would seem that the record is not sufficient to raise the question of the validity of Regulation No. 9. Each party has made a motion for a directed verdict, and that being true, each party consented that the Court should find the necessary facts. Such is the effect of the pertinent decisions heretofore referred to. It would seem that in order to an application of Regulation No. 9 a finding precedent was necessary that the butter had a moisture content of 16% or more. The testimony in behalf of the government was that the average moisture content of all the samples was 16.76%. It is wholly precarious that the moisture content in the samples, or the average thereof, would sustain a finding that the moisture content of the butter in question equalled or exceeded 16%. The average moisture content of the butter in question taken from the composite tests at the time of churning was 15.68%. Transcript Pages 249, 276. It is to be noted here that two of the churn tests showed a moisture content of 16%, but under such circumstances there is no reworking because there

is a natural shrinkage. Transcript Pages 29, 276. The point, however, remains that in order to raise the question of the application and validity of Regulation No. 9, a finding by the trial court is necessary as to the moisture content. The moisture content as found in the composite tests made by the plaintiff during the churning of the butter is entitled to more weight in any event than the sample tests made by the government. (Transcript Page 64.) As noted, the record will not support a finding that the moisture content equalled or exceeded 16%, and, this being true, the record is not sufficient to raise the question of the validity of Regulations No. 9.

This is particularly true also because:

> "* * * There is no evidence in the record that the average moisture found in the butter got there by the intentional or effective use of a process or material by plaintiff which caused the butter to absorb such moisture."
>
> Lynch vs. Tilden Produce Co., 282 Fed. 57.

We may here observe that Cohen vs. Edwards, Collector, 256 Fed. 964, is not an authority, for the reason that the decision in the case is evidently bottomed upon the validity of Regulation No. 9. Regulation No. 9, for the reasons which have been stated, is arbitrary and void on its face as matter of law.

IV.

Section 5978 of the Compiled Statutes, so far as material, reads as follows:

> Manufacturers of, or dealers in, process, renovated, or adulterated butter—Special taxes are imposed as follows:
>
> Manufacturers of process or renovated butter shall pay fifty dollars per year and manufacturers of adulterated butter shall pay six hundred dollars per year. Every person who engages in the production of process or renovated butter or adulterated butter as a business shall be considered to be a manufacturer thereof. (May 9, 1902, c. 784, § 4, 32 Stat. 194.)

Section 6215 idem reads as follows:

> Butter defined—For the purposes of this act the word "butter" shall be understood to mean the food product usually known as butter, and which is made exclusively from milk or cream, or both, with or without common salt, and with or without additional coloring matter. (Aug. 2, 1886, c. 840, § 1, 24 Stat. 209.)

Section 6233 idem reads as follows:

> Butter, adulterated butter, and process or renovated butter; defintion—For the purpose of this Act "butter" is hereby defined to mean an article of food as defined in "An Act defining butter, also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine," approved August second, eighteen hundred and eighty-six; that "adulterated butter" is hereby de-

fined to mean a grade of butter produced by mixing, reworking, rechurning in milk or cream, refining, or in any way producing a uniform, purified, or improved product from different lots or parcels of melted or unmelted butter or butter fat, in which any acid, alkali, chemical, or any substance whatever is introduced or used for the purpose or with the effect of deoderizing or removing therefrom rancidity, or any butter or butter fat with which there is mixed any substance foreign to butter as herein defined, with intent or effect of cheapening in cost the product or any butter in the manufacture or manipulation of which any process or material is used with intent or effect of causing the absorption of abnormal quantities of water, milk or cream; that "process butter" or "renovated butter" is hereby defined to mean butter which has been subjected to any process by which it is melted, clarified or refined and made to resemble genuine butter, always excepting "adulterated butter" as defined by this Act. (May 9, 1902, c. 784, § 4, 32 Stat. 194.)

Section 6238 idem reads as follows:

Tax on adulterated or renovated butter; stamps—Upon adulterated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of ten cents per pound, to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound, and that upon process or renovated butter, when manufactured or sold or removed for consumption or use, there shall be assessed and collected a tax of one-fourth of one per cent per pound,

> to be paid by the manufacturer thereof, and any fractional part of a pound shall be taxed as a pound. The tax to be levied by this section shall be represented by coupon stamps, and the provisions of existing laws governing engraving, issuing, sale, accountability, effacement, and destruction of stamps relating to tobacco and snuff, as far as applicable, are hereby made to apply to the stamps provided by this section. (May 9, 1920, c. 784, § 4, 32 Stat. 194.)

Besides taxes, it is to be noted that the statutes in question have to do with (1) Butter, (2) Adulterated butter, and (3) Process or Renovated butter. Process or renovated butter, as defined, appears to mean one and the same thing. The cited statutes are taken from the Act of August 2, 1886, commonly called the Oleomargarine Act, and from the Act of May 9, 1920, which may be called the Adulterated Butter Act.

Obviously, the butter which is manufactured by the Tilden Produce Company, and which is involved in the case at bar, is butter as defined by Section 6215, supra.

Obviously, the butter in question is not adulterated butter, and it is not process or renovated butter as defined in Section 6233, supra.

We come now, to an analysis of adulterated butter as defined in Section 6233. The definition of adulterated butter in Section 6233 divides itself into four parts:

(1) Butter rechurned in milk or cream,

(2) A product produced from different lots of melted or unmelted butter, adding a chemical to remove rancidity,

(3) Butter with which is mixed a foreign substance which cheapens the product, and

(4) Butter in the manufacture of which a process or material is used with intent or effect to cause the absorption of abnormal quantities of water, milk or cream.

This latter obviously means the absorption extraneously of water, milk or cream; that is, added water, milk or cream. It is noted that the word "water" (moisture) does not alone appear, but the words "milk and cream" also appear in the statute. The words "milk and cream" are as equally significant as the word "water," and show that the statute does not contemplate water, milk and cream which is naturally constituent.

The remaining portion of Section 6233 has to do with process or renovated butter.

To demonstrate that the position taken by the Government in the case at bar is fallacious, we have merely to observe that there is not a legally licensed manufacturer of adulterated butter in the United States, nor is there any regular payment of stamp taxes on adulterated butter by any manufacturer or dealer in the United States. Transcript page 117. The law stopped the business. Transcript page 119. A few manufacturers of process or

renovated butter have been licensed, and such parties regularly pay the special taxes and the stamp taxes on process or renovated butter. The Government reports will bear this out. The only application of the statutes providing for the special tax on manufacturers of adulterated butter and the stamp taxes on adulterated butter is embraced in the sporadic seizure by the Government of butter, testing it for moisture under Regulation No. 9, and when such tests show a moisture content of 16% or more, the imposition of the special taxes and the stamp taxes under color and by virtue of such regulation alone.

Obviously also this is not a case where the Commissioner is empowered to make certain findings under Section 14 of the Act of August 2, 1886 (Section 6226).

CONCLUSION.

For the reasons stated, it is submitted (1) that the testimony is conclusive that the butter in question was not adulterated butter, (2) that Regulation No. 9 is void, and (3) that the record is not sufficient to raise the question of the validity of Regulation No. 9.

We are taking the liberty of adding in the appendix studies in the composition of contest butter conducted by J. R. Keithley of the University of Minnesota in the years 1922 and 1923. Mr. Keithley was formerly connected with the Dairy Division of the United States Department of Agriculture.

The judgment of the court below should be affirmed.

Respectfully submitted,

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APPENDIX.

University of Minnesota, Cooperating With Dairy and Food Commission, Studies Composition of Educational Scoring Contest Butter.

By J. R. Keithley—Minnesota.

The University of Minnesota, Dairy Division, in a study of the variation in composition of butter made in Minnesota creameries and entered in the May Scoring Contest, which is conducted by-monthly under the supervision of the State Dairy and Food Commission, finds a wide variation in the 264 samples analyzed. The following table briefly summarizes the results of the analysis.

Table 1.—Variation in Composition of May Contest Butter.

	Percentages		
Constituent	Maximum	Minimum	Average
Water	20.2	11.4	14.699
Fat	87.1	76.7	82.580
Salt	3.6	.6	1.959
Curd	1.9	.2	.762

An examination of the individual samples in the contest showed that only 11 were below 80% in

butterfat, 27 were between 81% and 80% while 226 were above 81% in butterfat. Thirty-eight of the 264 samples analyzed contained 16% water or above.

Variation in Composition of 2,050 Samples of Contest Butter.

Constituent	No. of Samples	Percentages Maximum	Minimum	Average
Water	2050	24.2	9.2	13.926
Fat		88.9	70.6	83.346
Salt		4.1	.1	1.770
Curd		2.5	.2	.852

Below 80% fat=62.
Between 80% and 81%=96.
Above 81% fat=1892.
16% water or above= 152 or 7.414%.

The Composition of 1,432 Samples of Contest Butter Showed the Following:

Constituent	Percentages Maximum	Minimum	Average
Water	24.2	9.8	14.1
Fat	88.2	73.5	83.2
Salt	4.7	.1	1.8
Curd	2.5	.2	.8

49 samples were below 80% fat.
92 samples were between 80 and 81% fat.
1191 samples were above 81% fat.
131 samples contained 16% water or more.

COMPOSITION OF BUTTER IS IMPORTANT.

Minnesota has about 830 creameries and makes annually approximately 160 million pounds of butter. This butter, composed of butterfat, water, salt and curd, varies rather widely in percentage composition from churning to churning. In efficiently operated centralizers and many privately owned and large cooperative creameries butter is not packed until its composition is determined and made to conform to a standard composition. This standard is rather definitely determined.